

**IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**BETWEEN:**

**WILLIAM PHIRI**

**AND**

**REGINA CHAMA**

**APPEAL NO. 228/2013**

**SCZ/8/286/2013**



**RESPONDENT**

Coram: Mwanamwambwa, DCJ, Kajimanga and Musonda, JJS  
on 12<sup>th</sup> May, 2016 and 15<sup>th</sup> November, 2017.

For the Appellant: Mr. B.C. Mutale and Mr. E. Banda, of Messrs Chibundi  
& Co.

For the Respondent: Mr. Chewe, of Messrs Nchito & Nchito.

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## **J U D G M E N T**

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**MUSONDA, JS, delivered the Judgment of the Court.**

**Cases referred to:-**

1. **Kenmuir vs. Hattingh (1974) Z.R. 162.**
2. **Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172.**
3. **Nyalungwe vs. The People (1976) Z.R. 176.**
4. **DPP vs. Hester [1973] A.C. 296.**
5. **Sell vs. Associated Motor Boat Co. (1968) E.A. 123.**
6. **Attorney General vs. Marcus Achiume (1983) Z.R. 1.**
7. **Sithole vs. State Lotteries Board (1975) Z.R. 106.**
8. **Sablehand Zambia Limited vs. Zambia Revenue Authority (2005) Z.R. 109.**

This is an appeal from a judgment of a High Court Judge sitting in an appellate capacity, who had set aside a judgment of a subordinate court of the first class which had upheld a claim by the

appellant, then plaintiff, that a real property known as flat number 108D-229/11321, Nakatenge Street, Libala Stage 4B, Lusaka, had not been sold to or bought by the respondent, then 1<sup>st</sup> Defendant.

The learned High Court Judge adjudged that, contrary to what the subordinate court of the first class had determined, the appellant did, in fact, sell his property in question to the respondent. In this judgment, we propose to continue referring to the property in question as "the property".

The history and background facts surrounding this matter is fairly straight forward.

The appellant had been living in the property as a tenant of the Lusaka City Council from as far back as January, 1982. In 1996 he was offered to buy the property by the Lusaka City Council. In August, 1997, the appellant vacated the property and moved into his deceased brother's house in Chilenje, within Lusaka and left the property under the care of one Kennedy Zulu, his then brother-in-law.

According to the evidence which was placed before the subordinate court, sometime in July, 1998, the respondent saw an

advertisement in the *Times of Zambia* by which interested persons were being invited to purchase the property. According to the respondent, she subsequently purchased the property from the appellant. The appellant, for his part, denied having ever sold the property to the respondent. The two parties subsequently appeared before officers of the Lusaka City Council who advised them to take the dispute to a court of law.

On 3<sup>rd</sup> May, 2006, the appellant decided to commence an action against the respondent in the subordinate court of the first class seeking the following:-

- "1. Change of Title relating to Flat No. 108D-229/11321 Nakatenge Street, Libala Stage 4B; into the Plaintiff's name;**
- 2. Vacant possession of Flat No. 108D-229/11321 Nakatenge Street, Libala Stage 4B;**
- 3. Costs of or incidental to this action;**
- 4. Any further or other relief."**

Following the commencement of trial of the matter before the subordinate court, Kennedy Zulu was joined to the action as 2<sup>nd</sup> Defendant.

The matter was subsequently tried before a Class 1 Magistrate. During the trial, the appellant, then plaintiff testified on his own



behalf but did not call any witnesses while the respondent, then defendant, testified on her own behalf and called two witnesses.

The gist of the appellant's evidence -in-chief before the trial Magistrate was that he bought the property from the Lusaka City Council. He paid for the property in three instalments; the first in December, 1996 and the last in July, 1998.

The appellant further testified that he vacated the property in August, 1997 and left the same under the care of Kennedy Zulu, his then brother-in-law who was neither given any power of attorney in relation to the property nor allowed to sell the same. The appellant denied ever having sold the property to nor ever entering into sale negotiations with the respondent.

Under cross-examination by the respondent's counsel, the appellant told the trial Magistrate that he first met the respondent in August, 1998 when the latter went to the former's place of work. According to the appellant, that was the first time he was talking to the respondent. The respondent had gone to see him in connection with water and electricity bills which had arisen at the property. The appellant further informed the trial Magistrate that it was at this



point that he learnt about the property having been bought by the respondent.

Upon being shown the contract of sale which had been executed in respect of the property and which contract bore his names and signature as well as the respondent's names and signature, the appellant told the Magistrate that although the signature looked like his, he was not the one who signed.

The appellant further testified that he and the respondent subsequently appeared before the Lusaka City Council Registrar who advised them to take the matter to court. The appellant, in the meantime, reported the matter to the Police.

The appellant also testified in cross-examination by the respondent's counsel that he could not immediately proceed with a court action because Kennedy Zulu promised to sell his vehicle and use the arising sale proceeds to refund the respondent her money. According to the appellant's testimony, Kennedy Zulu signed a document at the police station to confirm what he had undertaken to do. The appellant could not, however, produce the document he was referring to.

The appellant's final response to defence counsel's questions was that he did not want to forcibly eject the respondent from the property but, instead, allowed a grace period for the respondent to remain in the property until Kennedy Zulu refunded the money she had paid for the property.

Upon being cross-examined by Kennedy Zulu, the second defendant in the subordinate court proceedings, the appellant told the court that the Land Card relating to the property was with him - Kennedy Zulu. The appellant also confirmed that he knew Lisef School and Mr. Patel. He testified that he knew Patel because he, Patel, took the respondent's husband to court. He further told the court the following:-

*"...Patel was the [respondent's] boy friend.. I have never met Mr Patel... We met at Agricultural house... I don't remember what I told him the second time we met... Kennedy Zulu did not witness... the sale of the house."*

Upon being re-examined by his counsel, the appellant told the Magistrate that he met the respondent for the first time when she went to see him in connection with water and electricity bills relating to the property. According to the appellant, the respondent told him

that she bought the property from Kennedy Zulu whose sister the appellant had been but was no longer married to.

The respondent, for her part, opened her evidence-in-chief before the trial Magistrate by telling that court that it was the appellant who had sold her the house in question after she had responded to an advertisement which had been published in the *Times of Zambia* of 22<sup>nd</sup> July, 1998.

The respondent further testified that after making a few follow-ups over the advertisement in question, she was visited by the appellant and Kennedy Zulu at Lisef School, which was her place of work.

According to the respondent, it was at Lisef School that the negotiations for the sale transaction took place. The respondent was assisted in the negotiations by her boss (Mr. Patel). The respondent and the appellant agreed on K6,000,000.00 as the sale price.

On 30<sup>th</sup> July, 1998, the two parties signed a contract which had evidenced the sale and purchase in question. Kennedy Zulu witnessed the contract which the respondent produced in evidence.



The respondent further testified that, apart from the contract of sale, the two parties signed another document which was dated 5<sup>th</sup> August, 1998. The respondent produced this second document as well in her evidence in court.

According to the respondent, sometime in August, 1998, she and the appellant went to the Lusaka City Council offices for the purpose of securing the change of ownership. For the removal of any doubt, the respondent moved into the property following the handing over of the keys to the property by the appellant.

The respondent further testified that, in November, 2003, she was desirous of extending the property and went to the Lusaka City Council for that purpose. On getting to the Council, the respondent was surprised to find that the appellant had lodged a caveat against the property. The respondent further testified that she telephoned the appellant to inquire about the caveat. In the telephone exchanges which ensued, the appellant denied ever signing the sale and purchase documents which we earlier referred to in this judgment.

When the Council could not resolve the matter, the two (appellant and respondent) were advised to proceed to court.

According to the respondent's further evidence-in-chief, she had been living in the property in question since August, 1998; the property was hers. She had not committed any fraud but had paid the appellant the agreed purchase price of K6,000,000.00. She told the court that the appellant was not entitled to claim back the property which he sold 18 months earlier.

In response to questions which were put to her in cross-examination, the respondent told the trial court that she paid the appellant K6,000,000.00 for the property on 30<sup>th</sup> July, 1998 and that the keys were delivered to her on 5<sup>th</sup> August, 1998. She expressed surprise that the appellant had lodged a caveat against the property.

Kennedy Zulu took the stand thereafter to testify on behalf of the respondent. He told the court in his evidence-in-chief that he and the appellant had placed an advertisement in the *Times of Zambia* for the sale of the property in question.

After placing the advert in the paper, Kennedy Zulu confirmed that he received calls from interested persons because he had access to a phone.

Among the calls that he received was one from Lisef School. Zulu confirmed that he spoke to a Mr. Patel who confirmed that they wanted to buy the property for one of their members of staff. Zulu also confirmed that the appellant received a cash sum of K6,000,000.00 from the respondent and that he, Zulu, witnessed the passing of the money from the respondent to the appellant.

Zulu also confirmed that after signing the contractual documents, the appellant handed over the keys to the property to the respondent.

Upon being cross-examined by counsel for the appellant, Zulu confirmed that the sale negotiations involved the appellant himself, Mr. Patel of Lisef School and the respondent. He also confirmed that he witnessed the transaction document.

Arnold Mwanza was the respondent's 2<sup>nd</sup> witness. He told the trial Magistrate that he used to see the appellant and Zulu when the duo visited Lisef for a business transaction. Mwanza also confirmed



that the respondent paid a cash sum of K6,000,000.00 to the appellant on 30<sup>th</sup> July, 1998 at Lisef School.

Upon being cross-examined by the appellant's counsel, Mwanza told the court that he witnessed the payment of the K6,000,000.00 for the sale of the house. He also confirmed that, apart from himself, there were three others when the K6,000,000.00 was paid to the appellant.

On the basis of the evidence which was unravelled before him, as set out above, and the respective submissions of counsel involved, the trial Magistrate determined, on a balance of probabilities, that the appellant did not sell the property to the respondent. The Magistrate's conclusion was anchored on the fact that the respondent did not have a Certificate of Title in respect of the property but had a Deed of Gift. The court accordingly entered judgment in favour of the appellant and ordered the respondent to yield vacant possession of the property in favour of the appellant.

The respondent was not satisfied with the judgment of the subordinate court and decided to appeal against the same to a High Court judge on the basis of the following grounds:-

- “1. The learned trial Magistrate erred in law by ignoring the corroborative evidence of Kennedy Zulu, Arnold Mwanza and Regina Chama which established that the Plaintiff was paid ZMK6,000,000.00 personally by Regina Chama on 30<sup>th</sup> July, 1998.
2. The learned trial Magistrate erred in law and fact by not considering the evidence of time difference between 1998 when William Phiri was paid and 2004 when he commenced these proceedings. The trial court did not ASK why it took the Plaintiff so long to sue.
3. The learned trial Magistrate was misled by the submissions of Counsel for the Plaintiff that the law of contract demands ONLY that a contract for sale of land be in writing and that the issue of fraud was not proved.
4. The decision to hand over possession of the house to the Plaintiff ignores the fact that the Plaintiff will be unjustly enriched by this decision and the first Defendant will suffer irreparable damage. The Plaintiff will gain both the ZMK6,000,000.00 and the house.
5. The court below was also misled in fact when it did not consider Kennedy Zulu's evidence that it was Kennedy Zulu and the Plaintiff who put the advertisement in the newspaper for the sale of the house.”

Counsel for the two parties filed their respective Heads of Argument to support the positions which they had respectively taken in relation to each one of the grounds of appeal which have been highlighted above which the court below considered.

In his judgment, the learned High Court Judge opened his reflections by observing that the resolution of the appeal which had been escalated to him hinged on matters of credibility. In the view of the learned judge, matters of credibility are ordinarily resolved by the trial court which would have had the opportunity to see and hear witnesses testify. In the specific context of the matter which had been escalated to him, the learned Judge noted that although it was for the trial Magistrate to resolve issues of credibility, that court had failed in its duty in that it did not even reveal its mind as to why it had found the evidence of one party (the appellant) more credible in relation to that of the other party (the respondent). Under those circumstances, the learned Judge reasoned that the judgment of the trial Magistrate was unhelpful and went on to draw the following conclusions:-

*"The judgment [of the trial Magistrate] is so bereft of reasoning that this court was forced to peruse the record and interfere with the findings of fact of the trial court without the benefit of having seen the demeanor of witnesses. Even as I undertook that unfortunate endeavor, I remained mindful of the danger of the sojourn.... However, as submitted by counsel for the appellant, this court has the power to interfere with findings of fact made by a lower court if the findings were findings which, on a proper*



*view of the evidence, no trial court acting properly can reasonably make. That is the view that I take”.*

The court below went on to observe that the appellant's outright denial that he ever signed the contract of sale relating to the property was a grave matter which imputed fraud and yet he never took any steps to involve the law enforcement agencies of the Republic of Zambia.

The court below accordingly concluded that the appellant did, in fact, sell the property to the respondent for the sum of K6,000,000.00 as per the contract of sale dated 30<sup>th</sup> July, 1998. It is this Judgment that the Appellant has now appealed against to this ultimate Court on the basis of the following grounds which are embedded in the Memorandum of Appeal:-

- “1. The court below erred in law and in fact when it made the finding that Defence Witness 3, Arnold Mwanza's evidence corroborated the Respondent's evidence when in fact the two were contradictory of each other as to how the sale of the flat was transacted.**
- 2. The court below erred in law and fact when it failed to make a finding of forgery but instead held that the two agreements of 20<sup>th</sup> July, 1998 and 5<sup>th</sup> August, 1998 purported to have been signed by the Appellant were admissible ignoring the Appellant's evidence**

that the signatures were forged and the fact that the same was marred with inconsistencies.

3. The court below erred in law and in fact when it held that the "Respondent allowed the fraud" which finding was contrary to the evidence produced by the Appellant in the form of police call-outs, placement of caveat on the property and letters to Lusaka City Council.
4. The court below erred in law and in fact when it decided the matter before it without properly analysing the evidence on the Record thereby making findings of fact which were perverse and unsupported by any evidence."

Learned counsel for the two parties to the appeal filed their respective Heads of Argument on 5<sup>th</sup> December, 2013 and 17<sup>th</sup> February, 2014 for the purpose of buttressing or reinforcing their respective positions in the appeal.

Speaking to the appellant's Heads of Argument, counsel for the appellant begun by giving a brief background to the matter before proceeding to argue the four grounds of appeal together on the basis that the four grounds revolved around one overarching ground, namely, ground 4, in terms of which the appellant faulted the court below for having "*...decided the matter before it without properly analysing the evidence on the record thereby making findings of fact which were perverse and unsupported by any evidence*".

Launching his assault against the lower court's judgment, counsel for the appellant contended that the learned Judge had no opportunity to see and hear the witnesses testify and yet he went ahead and reversed the findings of the trial Magistrate. According to the appellant's counsel, it was only the trial Magistrate who was entitled and competent to make the findings which he had made on the basis of his assessment of the evidence which had been deployed before him and his assessment of the credibility of the witnesses who had testified before him because he had the opportunity to see and hear them testify. To buttress this argument, counsel relied on the case of **Kenmuir vs. Hattingh**<sup>1</sup> where we held that:-

**"Where questions of credibility are involved an Appellate Court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that he has fallen into error."**

Counsel went on to argue that in the context of this matter, the learned Judge in the court below wrongly interfered with findings of fact made by the trial Magistrate when the Magistrate had not fallen in error and that this was a misdirection. Counsel further argued that, in coming to his conclusion that the appellant had sold the property to the respondent, the Judge below ignored the trial



Magistrate's finding of fact to the effect that had the appellant sold the property to the respondent, she would have acquired a Certificate of Title and not a Deed of Gift. According to counsel for the appellant, the learned Judge in the court below had no evidence to support his conclusion. To support his argument, counsel relied on the case of **Wilson Masauso Zulu vs. Avondale Housing Project Limited<sup>2</sup>** in which we held as follows:-

**“(ii) The Appellate Court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of facts.”**

It was the appellant's counsel's fervent contention that the court below had no reason to reverse the findings of fact which had been made by the trial Magistrate given that the same were neither perverse nor had they been made in the absence of any relevant evidence or upon a misapprehension of facts.

It was the appellant's counsel's further contention that the court below also erred when it made a finding of fact that the appellant had allowed the fraud to persist and that the appellant's behaviour was inconsistent with that of a person who wanted to assert his right of ownership of the property. According to counsel,

this finding by the court below flew in the teeth of the evidence on record as the appellant had done what a reasonable person in his position would have done, given the circumstances, by placing a caveat on the property as soon as he discovered what had happened. Counsel also noted that the Appellant had also made efforts to have the matter determined administratively by writing a letter to the Legal Department of the Deeds Registry at Lusaka City Council dated 10<sup>th</sup> November, 2003 adding that it was only when these efforts proved futile that the appellant decided to commence the action in the Subordinate Court.

Counsel further attacked the Judge in the court below for finding that Arnold Mwanza (DW3)'s evidence regarding how the sale of the property was transacted had corroborated the respondent's evidence when, in fact, it had not. Counsel argued that the respondent had testified that the property was sold to her when she responded to an advertisement in the *Times of Zambia* newspaper dated 22<sup>nd</sup> July, 1998 which, according to counsel, the respondent failed to produce in court.

According to the appellant's counsel, even after responding to the advertisement, the respondent only spoke to the appellant on

phone. Counsel further argued that there were a number of inconsistencies in the testimonies of the respondent and her witnesses (DW2 and DW3) even with regard to who had paid for the property.

The appellant's counsel vehemently maintained that the evidence of the respondent was suspect and required to be corroborated by independent evidence. In this regard, the learned counsel insisted that neither the evidence of DW2 nor that of DW3 had corroborated the testimony of the respondent given that the testimonies of the three witnesses were characterised by inconsistencies which suggested that none of them was telling the truth. Counsel argued that it is well settled in law that although a witness may be competent, if they are a suspect witness the court will attach little weight to the evidence unless it is corroborated by some independent witness or supported by some other independent evidence. To buttress his contention, counsel cited the case of **Nyalungwe vs. The People**<sup>3</sup> where we held, *inter alia*, that:-

**"The function of the corroborative evidence is to satisfy the court that it has not been deceived into believing plausible accomplices."**



Counsel further argued that the Record revealed that the evidence adduced by the respondent needed to be corroborated and that both DW2 and DW3's testimony was in conflict with that of the respondent which, it was further contended, suggested that some of or all the three witnesses were not telling the truth. In the light of the foregoing, counsel contended that there was no independent evidence to corroborate the respondent's assertions as to how the sale of the property was conducted. It was for the foregoing reasons that counsel for the appellant sought to have this court set aside the determinations of the court below.

The appellant's counsel also attacked the learned Judge in the court below for failing to make a finding of forgery and proceeding to hold that the two agreements of 30<sup>th</sup> July, 1998 and 5<sup>th</sup> August, 1998, purported to have been signed by the appellant were admissible in evidence. According to the appellant's counsel, this approach by the Judge below ignored the appellant's evidence that the signatures in question were forged and that the finding was marred in inconsistencies. According to learned counsel for the appellant, the learned Judge below should have made a finding of forgery as a fact

based on the evidence before him and the finding of the trial Magistrate.

Counsel further argued that the learned Judge should have also made a finding that the two agreements dated 30<sup>th</sup> July, 1998 and 5<sup>th</sup> August, 1998 which purported to have been signed by the appellant were inadmissible. Counsel accordingly concluded that the learned Judge's failure to proceed in the said manner constituted a misdirection on his part.

The appellant's counsel also further argued that although the Judge in the court below found that the Deed of Gift was never admitted as evidence, the Record shows that the respondent received a Deed of Gift for the purported transaction from a Mr. Mabuku from the Lusaka City Council and not an Assignment or Certificate of Title. According to the respondent's evidence, the reason why she was given a Deed of Gift instead of a Certificate of Title was because the appellant wanted to avoid paying 3% tax on the sale transaction relating to the property. According to counsel, this allegation could not stand because the respondent did not bring Mr. Mabuku to corroborate the same. In point of fact, the respondent had admitted

in cross-examination that the arrangement to avoid paying tax was illegal.

Counsel for the appellant concluded his arguments by contending that the fact that the respondent had received a Deed of Gift as opposed to as Certificate of Title was sufficient to entitle the Judge below to make a finding of forgery as this corroborated the appellant's denial of the contracts. Counsel accordingly urged us to allow the appeal with costs to the appellant.

For his part, learned counsel for the respondent also confirmed his reliance upon the respondent's Heads of Argument which were filed on 17<sup>th</sup> February, 2014. Counsel proposed to adopt the same approach which his colleague had adopted in presenting his arguments.

In response to grounds 1 and 4, counsel submitted that there was corroboration between the evidence of DW3 and the respondent as both had confirmed that the full purchase price of ZMK6,000,000.00 was paid to the appellant and that the transaction occurred at LICEF School. According to the learned counsel, this evidence, which was on Record and was also confirmed by DW2,



demonstrated the existence of corroboration as opposed to the assertions by the two being contradictory as the appellant's counsel had alleged. To support his corroboration argument, counsel cited the case of **DPP vs. Hester**<sup>4</sup> where Lord Borthygest stated that:-

**"The essence of corroborative evidence is that one credit worthy witness confirms what another witness has said."**

Regarding the appellant's argument that the court below erred when it interfered with the evidence on Record when it did not have the opportunity of seeing and hearing the witnesses testify, counsel for the respondent contended that the Judge was perfectly entitled to proceed in the manner he had done given that the trial Magistrate's findings were perverse and based on a misapprehension of facts. The respondent's counsel further argued that the question of the learned Judge having misdirected himself when he interfered with the trial Magistrate's findings of fact could not arise because the Judge had been fully alive to all the relevant risks and considerations and the very exceptional nature of the decision he had made. According to the respondent's counsel, the Judge in the court below warned himself about the dangers of interfering with the trial court's findings of fact on Record when he stated as follows:-

"The Judgment is so bereft of reasoning that this court was forced to peruse the Record and interfere with the findings of the trial court without the benefit of having seen the demeanour of the witnesses. Even as I undertook that unfortunate endeavour, I remained mindful of the danger of the sojourn."

Counsel further contended that the Judge below had satisfied himself that the trial Magistrate's judgment was bereft of reasoning and, therefore, rendered it perverse in terms of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**<sup>2</sup> case.

Counsel agreed with the Judge below that the judgment of the trial Magistrate properly warranted interference with that junior court's findings and conclusions. To support this position, counsel cited the case of **Sell vs. Associated Motor Boat Co.**<sup>5</sup> where it was observed, at page 126, as follows:-

"The principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Counsel also argued that the trial Magistrate's judgment was not only perverse but was also based on the evidence of one party without looking at the evidence of the other party. According to counsel, the Magistrate relied heavily on the evidence of the appellant without considering the evidence of the respondent. Counsel contended that this, in itself, entitled the court below to interfere. To support this proposition, counsel cited the case of **Attorney General vs. Marcus Achiume**<sup>6</sup> where we held that an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered is a misdirection which no trial court should reasonably make and entitles the appeal court to interfere.

In response to grounds 2 and 3, counsel for the respondent argued that the court below was justified in questioning the genuineness of the forgery or fraud which the respondent's assertions had pointed to given the period of time which had lapsed from the time the house had been sold to the respondent and the time the caveat was placed on the property. Counsel also argued in this regard that it took the appellant about three years to place the caveat against the property and six years before he thought of commencing this action.



Counsel for the respondent also agreed with the Judge below that an allegation of fraud is a serious matter and that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities. To support this contention, learned counsel for the respondent referred us to our decision in **Sablehand Zambia Limited vs. Zambia Revenue Authority**<sup>8</sup> where we reaffirmed that allegations of fraud must, once pleaded, be proved on a higher standard of proof than on a mere balance of probabilities because they are criminal in nature.

Counsel for the respondent concluded his arguments by contending that the appellant had failed to satisfy the court below on the treatment of allegations of fraud and that, under those circumstances, the court below was justified in upsetting the Magistrate's judgment.

The respondent's counsel accordingly invited us to dismiss the appellant's appeal with costs for want of merit.

We have considered the judgment of the trial Magistrate in the context of the judgment of the court below on the one hand and the arguments which counsel on the opposite sides of the contest

canvassed around the grounds which had excited this appeal on the other.

Although counsel for the appellant opted to present his arguments around the 4 grounds which had animated or inspired this appeal holistically and on the basis of ground 4 as the overarching ground, we propose to deal with each individual ground as presented.

The 1<sup>st</sup> ground of appeal attacks the learned Judge's determination that the respondent's evidence was corroborated by DW3 (Arnold Mwanza)'s evidence. In the view of counsel for the appellant, Mwanza's and the respondent's evidence with regard to how the sale of the property was conducted was contradictory and did not complement each other as the Judge below had opined.

As we see it, the dispute between the two protagonists in this appeal revolves around a very narrow compass: was there or was there not a sale and purchase transaction between the two in respect of the property in issue?

We must pause here to observe that although the action which was pleaded and prosecuted in the trial court did not extend a direct

invitation to that court to pronounce itself upon the legal positions of the two contestants in this appeal relative to the property which lies at the heart of the dispute between the two, it was both inevitable and necessary for the court to appropriately reveal its mind upon that issue. In point of fact, what was presented in the trial court as the remedies which were being sought by the pursuer of the action were of the character of consequential reliefs. The primary relief lay in having the court pronounce itself on the issue of legal ownership of the property which, in turn, had to be linked to the issue of whether or not the property had been the subject of a successful sale and purchase transaction.

Undoubtedly, the parties to the dispute which has now been escalated to this court carried the evidential burden of proving the correctness of their respective positions. In this regard, both the appellant and the respondent marshalled evidence which was intended to fortify their respective positions.

It is worthy pointing out here that while the appellant opted to testify on his own behalf and called no witness, the respondent testified on her own behalf and called two witnesses, namely, Arnold



Mwanza (DW3) and Kennedy Zulu (DW2) who testified on the respondent's behalf. For his part, Mwanza told the trial court that he used to see the appellant and Zulu when the duo went to Lisef School for a business transaction. Mwanza also confirmed that he witnessed the payment of the K6,000,00.00 for the sale of the property in issue. Mwanza further confirmed that aside from himself, there were three others who witnessed the payment of the K6,000,000.00 to the appellant. For the avoidance of doubt, Mwanza's evidence was not impugned in any material particular.

As we understood from the record, the respondent paid the K6,000,000.00 to the appellant at Lisef School in the presence of her boss (Patel), Mwanza and Zulu.

Having regard to the foregoing and notwithstanding any shortcomings which might have characterized Mwanza's evidence relative to the respondent's, the corroborative effect of the pieces of evidence we have highlighted above cannot be doubted. Indeed, we would agree with counsel for the respondent's well-articulated position on this point. In truth, ground 1 cannot succeed. We dismiss it.

Under ground 2, the appellant attacks the appellate Judge over his (alleged) failure to make a finding of forgery in relation to the two agreements which were executed in furtherance of the sale and purchase transaction between the appellant and the respondent.

In the view that we have taken, the faulting of the appellate Judge in the manner suggested in ground 2 is rather odd and unfortunate. As learned counsel for the appellant is well aware, the Judge from whom this appeal is arising was not sitting as a trial court but was exercising his appellate jurisdiction. The responsibility to make findings of fact ordinarily rests with a trial court. In the context of this matter, had the issue of forgery or fraud (which appear to have been first alluded to in the appeal below) been material to the issues at play in the matter, it ought to have arisen in the proceedings before the trial Magistrate. As things happened, the two issues hardly featured in the judgment of the honourable trial Magistrate. That this was the case should not have surprised either of the parties to the present contest, not least because the issue of fraud or forgery was not pleaded. In point of fact, the issue of 'fraud' arose for the first time in the context of the then appellant (now respondent)'s third ground of appeal in the court below. As we understood the then

appellant's counsel's arguments around that ground, he sought to discount any suggestion that the sale transaction in question was vitiated by fraud. For his part, the learned appellate Judge merely acknowledged that, in denying the signed contracts relating to the property in question, the appellant was effectively suggesting that a fraud had been perpetrated in connection with his house. It was clearly not open to the learned appellate Judge to make 'findings' of the nature he had allegedly failed to make. In any event, given the state of the law as we have repeatedly articulated it in decisions such as **Sithole vs. State Lotteries Board**<sup>7</sup>, **Sablehand Zambia Limited vs. Zambia Revenue Authority**<sup>8</sup> and others, there was simply no basis for either of the two courts below to launch a legitimate inquiry into the issue of fraud because the issue had neither been pleaded nor proven to the requisite degree.

The second ground of appeal has to fail. And it does.

With regard to the third ground, we do consider that the issues which we have canvassed above in the context of the second ground of appeal have served to gravely undermine the viability of this ground. Accordingly, we are inclined to dismiss this ground as well.



Under the fourth and final ground of appeal, counsel for the appellant faults the appellate judge for having “...*decided the matter before it without properly analyzing the evidence on ... record thereby making findings of fact which were perverse and unsupported by any evidence.*”

One thing which immediately strikes us with regard to the manner in which ground 4 is cast is that the learned appellate Judge is assumed to have been the trial court. Contrary to the suggestion by the learned counsel for the appellant, the learned appellate Judge did not make any findings of fact; rather, the judge was “... *forced to ... interfere with the findings of fact of the trial court without the benefit of having seen the demeanour of witnesses...*”. We have drawn these words from the judgment of the learned Judge at page 15 of the record.

As a matter of fact the learned appellate Judge felt duty-bound to “... *interfere with [the] findings of fact made by [the trial magistrate] [on the basis that] they were findings which, on a proper view of the evidence, no trial court acting properly can reasonably make.*”

Having regard to the fact that ground 4 totally misapprehends the role which the learned judge had played in this matter as revealed in the judgment which is now the subject of the present appeal to this court, we are inclined to dismiss this ground as well.

In sum, each one of the 4 grounds of appeal has failed. Consequently, the whole appeal stands dismissed with costs. The meaning and effect of this judgment is that the respondent is the lawful owner of the property known as flat number 108D-229/11321, Nakatenge Street, Libala Stage 4B, Lusaka, having purchased the same from the appellant. Henceforth, the respondent is entitled to peaceably and quietly enjoy the said property and to have the caveat which was entered against the said property by the appellant removed/or withdrawn forthwith and at the appellant's own cost.



**M. S. MWANAMWAMBWA**  
**DEPUTY CHIEF JUSTICE**



**C. KAJIMANGA**  
**SUPREME COURT JUDGE**



**M. MUSONDA, SC**  
**SUPREME COURT JUDGE**